Office-Supreme Court, U.S.
FILED
JUN 24 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1830

In the Supreme Court of the United States

October Term, 1984

LIBERTY NATIONAL BANK & TRUST COMPANY OF LOUISVILLE (f/d/b/a UNITED KENTUCKY BANK, INC.),
Petitioner,

vs.

KENNETH R. GEORGE and ALBERTA W. GEORGE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

LARRY E. PARRISH, ESQ.
(Counsel of Record)
PARRISH & MULROONEY, P.C.
Twenty-First Floor
First Tennessee Building
165 Madison Avenue
Memphis, Tennessee 38103
(901) 526-7777
Attorney for Respondents

BEST AVAILABLE COPY

TABLE OF CONTENTS

Counter-Statement of the Case 1
Summary of Argument 4
Response to Question 1 5
Response to Question 2 6
Responses to Questions 3 and 4 7
Conclusion 8

TABLE OF AUTHORITIES

Cases

Greenview Trading Company, Inc. v. Hershman and Leicher, P.C., 473 N.Y.S. 2d 722, Docket No. 22790 (1984) 7

Haroco v. American National Bank & Trust Company of Chicago, 747 F.2d 384 (7th Cir. 1984), *cert. granted sub nom., American National Bank and Trust Company of Chicago v. Haroco*, ... U.S. ....., 105 S.Ct. 902 (1985), Case No. 84-822 ..... 5, 7

Kenneth R. George and Alberta W. George v. The Liberty National Bank and Trust Company of Louisville, United Kentucky, Inc. and Does 1-99, No. 84-1392 4

Luebke v. Marine National Bank of Neenah, 567 F. Supp. 1460 (E.D. Wis. 1983) 7

Migra v. Warren City School District Board of Education, ... U.S. ....., 79 Law. Ed. 2d 56 (1984) 6

Sedima, S.P.R.L. v. Imrex Co., Inc., 741 F.2d 482 (2d Cir. 1984), *cert. granted*, ... U.S. ....., 105 S.Ct. 901 (1985), Case No. 84-648 4-5

Constitution

Constitution of the United States, Article VI, Cl. 2 6

Statute

28 U.S.C. §1332 6

Other

"The National Law Journal," June 17, 1985, at p. 10 7

No. 84-1830

In the Supreme Court of the United States

October Term, 1984

LIBERTY NATIONAL BANK & TRUST COMPANY OF LOUISVILLE (f/d/b/a UNITED KENTUCKY BANK, INC.),
Petitioner,

vs.

KENNETH R. GEORGE and ALBERTA W. GEORGE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

In the petition (pp. 3-8), Petitioner includes a misrepresented statement of the case. Throughout this litigation, misstatements by Petitioner to various courts have remained a continuing and serious problem. Because of this, Respondents must include an accurate account of the case in order for this court to know the context of what is presented for review.

Because it cannot be improved, Respondents adopt and incorporate here as their counter-statement of the case the statement on pp. 3-8 of the case included in their petition for certiorari. For convenience, those pages are included as Appendix A hereto.

But, Respondents would particularly highlight misstatements of the case of critical significance to claims made by Petitioner in this petition. On p. 4, third paragraph, second line of the petition [also see petition pp. 8 (fn. 2), 12 (fn. 4) and 15] Petitioner states, and would have this court believe, that Respondents, in the state proceedings below, filed counterclaims. This simply is not so, and Petitioner knows it is not true. Respondents, in the state court action, filed affirmative defenses *only*. Respondents, in the state court, *sought no affirmative relief* from the state court, and all claims made by Respondents were made in defense for no purpose other than to block the effort of Petitioner in its attempt to be awarded affirmative relief against Respondents.

Counsel for both sides and the court, in the state court proceedings, from time to time, erroneously referred to the affirmative defenses of Respondents as counterclaims. However, the record clearly speaks for itself and clearly reveals that Respondents never made any counterclaims.

Petitioner also attempts to leave with this court the false impression that the attempt of Respondents, in state court, to amend its defensive pleading (falsely stated by Petitioner to be a counterclaim) to include an affirmative defense of fraudulent inducement was an afterthought and an eleventh hour act of desperation in violation of a previous order of the state court to close the pleadings.

In fact, both Petitioner and Respondents proceeded on the assumption that the affirmative defenses pled by Respondents in the state court included a defense of fraudulent inducement. The memorandum of law filed by Petitioner in support of its motion for summary judgment includes a section devoted to an attempt to overcome the affirmative defense of fraudulent induce-

ment included in Respondents' responsive pleading. In the memorandum of law filed by Respondents in opposition to the motion for summary judgment, the thought that the affirmative defenses pled by Respondents included fraudulent inducement is unmistakable.

It was only in the context of argument before the state court on the motion for summary judgment filed by Petitioner that any question was raised concerning the fraudulent inducement affirmative defense. In that hearing, the court was stating its intention to enter a summary judgment and attempting to justify that decision. Counsel for Respondents noted, in response to the court, that Respondents had raised an issue concerning fraudulent inducement and, even if every other thing the court had stated as justification were true, whether there had been fraudulent inducement was indisputably a jury issue, and that Respondents intended to exercise their right to a jury determination.

Then, for the first time, the court stated that it did not consider that fraudulent inducement had been pled by the pleadings filed by Respondents. Therefore, the court said, a right to a jury determination on the fraudulent inducement issue was summarily pretermitted. *Then,* and only then, did Respondents ask permission to amend their responsive pleading so as to plead the affirmative defense of fraudulent inducement in a manner consistent with what the trial court seemed to think was necessary. The trial court *then* fell back on its previous order that the pleadings were closed, holding, therefore, that no amendment would be allowed. The court *then* proceeded on the assumption that Respondents had incurably failed to plead fraudulent inducement in defense. This was the classic Catch-22. This cleared the way for the court to enter the summary judgment which, at the outset, it convened to do.

SUMMARY OF ARGUMENT

It should first be noted that Respondents join with Petitioner in the belief that the decision by the Sixth Circuit which Petitioner seeks to have reviewed is rife with serious error of large magnitude and far-reaching consequence. The fact that the case was remanded by the Sixth Circuit to the district court for a trial restricted to one of the issues raised by Respondents' complaint, because of the prior erroneous holdings of the district court which were affirmed by the Sixth Circuit, provides little more than a seed bed for continuing an unnecessary controversy. Tried in its present state, one can be assured that the trial will result in many additional errors as perceived from the perspective of both adversarial sides. In other words, subsequent appeals and, most probably, subsequent petitions for certiorari to this court are inevitable if this case proceeds on the present state of the record.

Respondents have previously filed a petition for certiorari to this court in this case and earnestly believe, and sought to persuade this court, that this is one of those exceptional cases which demands review by this court. However, this court saw fit to deny Respondents' prior petition for certiorari. *Kenneth R. George and Alberta W. George v. The Liberty National Bank and Trust Company of Louisville, United Kentucky, Inc. and Does 1-99*, No. 84-1392.

The only opposition Respondents have to the present petition for certiorari is that it seeks to limit the issues so as to avoid this court's review of issues much more demanding of attention. Two of the issues which Petitioner seeks to have reviewed will be pretermitted any day by this court's decisions in *Sedima, S.P.R.L. v. Imrex Co., Inc.*,

741 F.2d 482 (2d Cir. 1984), *cert. granted,* ..... U.S. ....., 105 S.Ct. 901 (1985), Case No. 84-648 and *Haroco v. American National Bank & Trust Company of Chicago,* 747 F.2d 384 (7th Cir. 1984), *cert. granted sub nom., American National Bank and Trust Company of Chicago v. Haroco,* ..... U.S. ....., 105 S.Ct. 902 (1985), Case No. 84-822. These decisions are sure to be rendered before this court disposes of this petition.

RESPONSE TO QUESTION 1

What is most notable about the statement of Question 1 by Petitioner is that it is based on a false premise. At first blush the argumentation seems persuasive. But, when the straw man, built on Petitioner's false statements of factual predicates, is revealed, the underpinnings of the argument collapse, and the facade by which Petitioner seeks to mislead this court becomes evident.

Stated in a way consistent with the facts and record, the issue sought to be raised by Petitioner must include essential elements left out by Petitioner. That is, the issue is: (1) when a person who lives in a state different from another person against whom he wishes to make a claim; (2) is sued in the home state of the person against whom he wishes to make a claim by the person against whom he wishes to make a claim; (3) joined with other state court defendants whose residence is the same as that of the person against whom the out of state person wishes to make his claim; (4) and, before the out of state person is required by the law of the state to answer the state court claims; (5) he makes his claims in federal court according to his right under federal law; (6) must that person make those same claims as counterclaims in the state court; (7) or suffer bar by res judicata if the state court litigation concludes prior to the federal suit. This

is precisely what happened at the trial court (both state and federal) level in the instant case. The Sixth Circuit corrected the error of the district court. Now, Petitioner seeks to have this court reinstate the error of the district court as the law of the land. Respondents complained that the Sixth Circuit erred in that it only corrected that portion of the error of the district court which dealt with the fraudulent inducement issue. The Sixth Circuit found that there was a legally significant difference in whether the state trial court intended to rule or, as was the case with reference to the fraudulent inducement issue, explicitly failed to rule.

Reduced to its essence, the issue is whether the federal statutory right under Title 28, United States Code §1332 or state rules of procedure pertaining to counterclaims, even in the face of a pending federal court claim in a diversity case, holds sway one over the other. Petitioner claims that state procedural rules concerning counterclaims negate the federal statutory right to a federal forum. Respondents claim that such an interpretation would be a clear violation of the United States constitutional protections of due process of law and the Supremacy Clause. (Constitution of the United States, Article VI, Cl. 2). This court, purely by way of dicta and without even a suggestion as to what the proper answer might be, recognized the pertinency of the question late last year in its opinion in *Migra v. Warren City School District Board of Education*, ... U.S. ....., 79 Law. Ed. 2d 56, 65 (1984)

RESPONSE TO QUESTION 2

It is true that the question of whether state courts have jurisdiction over federal RICO suits is important. However, one question relative to this subject is beyond doubt.

If a claimant under the federal RICO statute files his claim in federal court and does not waive entitlement to a federal forum, it is impossible to force that federal court plaintiff to give up his right to a federal forum for resolution of the federal RICO question. This cannot be done via a state rule of procedure or by any other means.

The only case to clearly deal with the subject is *Greenview Trading Company, Inc. v. Hershman and Leicher, P.C.*, 473 N.Y.S. 2d 722 which held that state courts have jurisdiction over federal RICO claims made in state court. However, on May 28, 1985, the Appellate Division, First Department of the New York Supreme Court reversed that opinion in *Greenview Trading Company, Inc. v. Hershman and Leicher, P.C.*, ... N.Y.S. 2d ....., Docket No. 22790 (1984). This was reported in "The National Law Journal," June 17, 1985, at p. 10. The only other case known to have addressed the issue is *Luebke v. Marine National Bank of Neenah*, 567 F. Supp. 1460 (E.D. Wis. 1983) which suggested that state courts could exercise jurisdiction over the federal RICO statute.

However, in the instant case the federal RICO claims were made in federal court by a federal court plaintiff in a case where there was complete diversity between the plaintiffs and the defendant. These claims were pending in federal court before the federal court plaintiff was required to answer a state court foreclosure suit. A federal court plaintiff never waived or gave up in any way the right to a federal forum to adjudicate the federal RICO's claims.

RESPONSES TO QUESTIONS 3 AND 4

These questions are pretermitted by the eminent decision of this court in *Sedima* and *Haroco*.

CONCLUSION

Respondents agree with Petitioner that the Sixth Circuit erred in its decision, and that the error has grave consequences. Therefore, Respondents do not oppose this Court's granting of a writ of certiorari, but oppose the limitation of review to those issues sought to be reviewed by the petition and would request review of the issues raised in Respondents' prior petition for certiorari.

Respectfully submitted,

LARRY E. PARRISH, ESQ.
(Counsel of Record)
PARRISH & MULROONEY, P.C.
Twenty-First Floor
First Tennessee Building
165 Madison Avenue
Memphis, Tennessee 38103
(901) 526-7777
Attorney for Respondents

APPENDIX A

STATEMENT OF THE CASE

[3] The appeal which produced the opinion which this petition seeks to have reviewed was from a judgment on the pleadings by the district court dismissing the complaint by granting the Respondents' motion to dismiss based on *Federal Rules of Civil Procedure,* Rule 12(b)(6).

Because the chronology of pleading is important to the application of controlling substantive law, Petitioners will recite the order of relevant events in detail. The unfolding of this chronology will reveal the inter-relationship of the instant case and a separate state court proceeding [now pending before this court in the form of a petition for certiorari in *Kenneth R. George and Alberta W. George v. Liberty National Bank and Trust Co. of Louisville,* No. 84-1253 considered by the district court to control the instant case through collateral estoppel and res judicata.

On **October 27, 1981,** Respondent, United Kentucky Bank, Inc. (hereafter "UKB"), filed a complaint against Petitioners in the Jefferson County, Kentucky Circuit Court initiating a case bearing Docket No. 81CI-09925. This complaint alleged that Petitioners had breached alleged promissory notes, mortgages, and a guaranty agreement. In short, this state court complaint initiated a, more or less, routine mortgage foreclosure suit.

On **January 11, 1982,** Petitioners filed the complaint in the instant case. (App. D) Jurisdiction (a particularly important point) by the district court was invoked both on diversity and exclusive subject matter jurisdiction. The complaint made affirmative allegations against Respondents

alleging violation of Title 18, *United States Code*, §1962 ("RICO"), and Title 15, *United States Code*, §1 (Sherman Antitrust Act).

[4] The context of the allegations in the instant case was the *relationship* existing between Petitioners and Respondents which resulted in events which occurred because of those loans. This same relationship spawned the state court suit. By the complaint filed in federal court, Petitioners, in effect, pled that the notes and mortgages were instruments of fraud used by Respondents to wrongfully injure Petitioners. Petitioners alleged that Respondent's, UKB, state suit was filed as a part of and in furtherance of the mail fraud by Respondents. Whether Petitioners are entitled to prevail in the district court is not controlled by whether the instruments, viewed outside the context of the mail fraud *first charged* in Petitioners' federal suit, are valid or invalid.

On **January 13, 1982,** Petitioners filed an answer stating: (1) the state complaint failed to state a claim; (2) the mortgages had been released; (3) service of process was insufficient; (4) the state court lacked jurisdiction; and (5) a general denial of all factual allegations.

On **March 1, 1982,** Petitioners filed a supplemental answer to the state complaint. The supplemental answer described what was set out therein as follows:

> [s]how as *additional defenses* to the claims of Plaintiff . . . particularly described in the copy of said Complaint, attached hereto, incorporated by reference herein, ... (emphasis added)

The complaint incorporated is the one filed in the instant case on January 11, 1982.

On **June 10, 1982,** the district court below entered an order (App. E) overruling the motion of Respondents to dismiss the January 11, 1982 complaint for failure to state a claim.

[5] On **August 20, 1982,** Respondents filed a motion for summary judgment (App. F) in the state court. The motion for summary judgment sought nothing more than a summary adjudication that Petitioners were liable for breach of the notes, mortgages and guaranty.

On **September 10, 1982,** in the state case, Petitioners filed a sworn affidavit by one of the Petitioners making oath to numerous facts. (App. G)

On **October 25, 1982,** the state court entered a written order granting the summary judgment. (App. H) It is this summary judgment which the district court found to have sufficient preclusive effect to bar further adjudication in the instant case. (App. B, pp. A9-A19)

On **June 15, 1983,** Respondents, in the instant case, filed a document entitled "Motion To Dismiss Plaintiffs' Complaint Upon Theory of Res Judicata, Collateral Estoppel and/or The Full Faith and Credit Requirements of Title 28, *United States Code*, §1738."

It was this motion which the district court granted by its memorandum opinion and judgment entered **September 30, 1983.** (App. B, C)

The Sixth Circuit decided the appeal and filed its opinion (App. A) on **January 22, 1985.**

Summarizing the significant events occurring below for present purposes, Petitioners will direct the attention of this court to the crucial facts. Petitioners filed a complaint against Respondents in federal court alleging violations of RICO and the Sherman Act seeking remedy un-

der Title 18, *United States Code,* §1964 and Title 15, *United States Code,* §15. The RICO claims essentially amount to allegations that Respondents overcharged interest, deliberately and intentionally, by inducing Petitioners into a borrower relationship and, in furtherance of the scheme [6] and device accomplished by *mail* fraud, engaged in various specific acts including, but not limiting to, filing the state suit instituted by Respondent, UKB. In addition, the federal suit filed by Petitioners alleges pendent claims seeking relief under the common law for breach of fiduciary duties, breach of confidence, breach of contract and other such claims.

Petitioners filed suit in federal court relying on the provisions of Title 28, *United States Code,* §1332(a) because of *complete diversity* of citizenship.

Thereafter, Petitioners answered the state suit with general denials. In addition, by incorporation of Petitioners' federal complaint, Petitioners supplemented their answer with affirmative defenses.

In the state court suit, Respondent, UKB, filed a motion for summary judgment in accordance with the very ordinary provisions of *Kentucky Rules of Civil Procedure,* Rule 56, and Petitioners routinely filed a written memorandum in opposition and a sworn affidavit of one of the Petitioners and, thereby, offered proof on virtually every issue material to the claimed right to summary judgment including, but not limited to, the amount owed.

The state trial court entered a summary judgment precisely as requested by Respondent, UKB, *and more.* The state court went beyond the relief sought by the summary judgment and included in the summary judgment a finding that Respondent, UKB, had not been guilty of fraud and had not breached any fiduciary duty to Petitioners.

The motion for summary judgment did not seek a finding on the issue of fraud or fiduciary duties and, if Petitioners had failed to produce competent proof that there was a genuine issue in dispute on a material fact *essential to the summary judgment sought*, the summary [7] judgment could have been entered without any reference to or finding concerning fraud or fiduciary duties. Respondent, UKB, did not move for a summary judgment ruling that it did not defraud Petitioners nor breach any fiduciary duties. The summary judgment motion did not put Petitioners *on notice* that Petitioners were expected to defend against entry of a summary judgment adjudicating that Respondent, UKB, was not guilty of fraud and had not breached fiduciary duties. Petitioners conceded that these were matters of fact that could only be resolved after a plenary hearing and consideration of proof by the *jury demanded by Petitioners.*

In the federal suit filed by Petitioners, Respondents, United Kentucky, Inc. and Does 1-99, were parties-defendant. In the state suit, these Respondents were not parties in any capacity. The district court held that the state summary judgment in favor of Respondent, UKB, precluded the entire federal case and dismissed it in its entirety, including the claims against Respondents, United Kentucky, Inc. and Does 1-99.

The district court, after entry of the state summary judgment, dismissed the entire federal complaint filed by Petitioners because the state court included language in the summary judgment concluding the absence of fraud and that there had been no breach of fiduciary duty. The Sixth Circuit decision agreed with the district court except as to the specific allegations by Petitioners' federal suit relative to fraudulent inducement both as a matter of common law and, if the mails were used, as predicate offenses supporting RICO.

The district court was affirmed by the Sixth Circuit in holding that, although the RICO claims in the federal suit, being exclusive to federal jurisdiction, were not subject to preclusion by res judicata, the doctrine of collateral estoppel created a bar to further consideration. The district [8] court reached this conclusion because of the "no fraud" language by the state court.

As to the pendent claims, the district court was affirmed by the Sixth Circuit in the conclusion that the state court had concurrent jurisdiction to adjudicate the common law claims and, since the state court either did or "could have" ruled on those claims, the entry of the summary judgment in state court precluded the district court from further consideration of them because of the doctrine of res judicata.